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SUPREME COURT OF THE UNITED STATES

No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER

BRIEF IN BEHALF OF RESPONDENTS TO PETITION FOR CERTIORARI

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Petitioners,

VS.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER

Respondents.

RESPONDENTS BRIEF

1.

RESPONSE

A.

STATEMENT OF THE CASE

(1)

Controversion

Respondents are not satisfied with the statements of fact in this case as presented by the petitioners in the petition for certiorari, and they are controverted in the following particulars, to-wit:

On page four of the printed petition in this case, petitioners say: "The petitioner in the State Court did not ask that his lien be set up and established as a prior lien entitled to priority of payment and did not pray for any relief whatever in support of his alleged prior lien." Respondents contend that there is nothing in the record in this case to justify that statement. Certain allegations of the State Court petition are set out in the record at pages 37, 38 and 39, but the prayers of the State Court petition were *not in the record in the Courts below* nor are they contained *in*

the record before this Court; they are not contained in the copy of the record of the proceeding in the United States Circuit Court of Appeals for the Fifth Circuit served on respondents, although referred to on page four of the petition for certiorari as being contained at "pages four and five of the certified record."

This Court has held in the case of *United States v. Hosmer,* 76 U. S. 432, 19 L. Ed. 662, as follows:

> "The Supreme Court could not take cognizance of any fact beyond the scope of the record as it was made in the Court below."

If, however, the prayers of the petition in the State Court are in the record in this case by some means unknown to your respondents, respondents wish to call particular attention to the enumerated allegations of the petition in the record at pages 37, 38 and 39 thereof, and in connection therewith paragraph (h) of the prayer as follows:

> "That petitioner have such other and further relief as is equitable and meet in the premises."

Respondents submit that there is no prayer to "divide the proceeds among the creditors," but a prayer that "the respective rights, dignity and priority of all creditors be set up and established herein."

However, the State Court petition is amendable by adding additional prayers, if such prayers are consistent with the nature of the case made by the petitioner. See *Pickens v. Jackson,* 152 Ga. 100, 108 S. E. 536, headnote nine as follows:

> "An amendment to the petition, which does not add a new and distinct cause of action, or new and distinct parties, is not demurrable on the ground that it 'adds additional prayers praying for new and different relief' if such prayers are consistent with the nature of the case made by the petition. This ground of the demurrer should have been overruled."

See also, *Fitzpatrick v. Paulding*, 131 Ga. 693, 63 S. E. 213; *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953.

(2)

Additional Statement of Facts

Respondents feel that additional facts are necessary to a clear understanding of the issues here. They are as follows:

Oberdorfer obtained a judgment against Yoshinuma, on the 29th day of April, 1942, on which a nulla bona was entered by the officer charged with its enforcement, and thereafter, after having exhausted its legal remedies, Oberdorfer filed an equitable petition for the enforcement of its judgment lien in the Superior Court of Fulton County, Georgia, on May 13, 1942. On the same day Marvin G. Russell was appointed receiver by that Court, and took possession of the assets now in dispute (R. 8, 9, 36).

On September 15, 1942, an involuntary petition in bankruptcy was filed in the District Court of the United States for the Northern District of Georgia against the defendant, Yoshinuma, and, consenting thereto, he was subsequently adjudicated a bankrupt (R. 12).

A period of more than four months elapsed between the appointment of a receiver in the State Court and the filing of the petition in bankruptcy in the Federal Court.

B.

QUESTIONS PRESENTED

Under the heading "Questions Presented," petitioners here contend that one of the questions presented is whether a "State Court insolvency proceeding tantamount to bankruptcy is superseded by bankruptcy whether instituted within or more than four months before bankruptcy." This question is raised under all four of the paragraphs under this heading, and each of the points made are entirely predi-

cated upon that question. Attention of this honorable Court is called to the fact that this question was not raised in the "Statement of Points" and "Assignments of Error" in the record on appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 18, 19, 20, 21). On the contrary, in the second assignment of error in CCA, in paragraph (d) thereof, petitioners use the following language:

> "Appellants contend that the bill in equity filed in the State Court was an equitable petition in aid of a common law judgment . . . " (R. 19).

The petitioners conceded that this question was not raised in the Court below, in a proceeding filed by them in the State Court after the completion of the trial of this case in the District Court, where they alleged that the State Court petition was for "the enforcement of a common law judgment lien, and was not, as a matter of law a creditors' bill" (R. 62, paragraph 2) ; and *where it was not raised in the Court below, it cannot now be raised in this Honorable Court for the first time.* See the case of *D. E. Virtue v. Creamery Package Manufacturing Co.*, 227 U. S. 8, 57 L. Ed. 393(3), where the Court said:

> "A contention not made either in the Circuit Court or the Circuit Court of Appeals, and which is contrary to the theory on which the case was tried, will not be considered by the Federal Supreme Court."

C.

"REASONS FOR GRANTING THE WRIT"

(1)

First Ground

Replying to the first ground cited by petitioners as "Reason for Granting the Writ," respondents respectfully urge that the decision in the case at bar is not in conflict with the applicable decisions of this Court nor with any decisions of the Circuit Courts of Appeal of other Circuits, nor with the other decisions cited by petitioners.

So far as we are able to determine, the only basis for the contention that there is such a conflict, is the contention by the petitioners that the State Court proceeding in this case was one under a statute "tantamount to bankruptcy"; and we have shown that that point was not in issue in the Courts below.

Nevertheless, we shall attempt to show that the cases cited by petitioners are not in conflict with the decision in the case at bar, as follows:

The case of *Stratton v. New*, 283 U. S. 327, 51 S. Ct. 465, 75 L. Ed. 1060, is, as the Circuit Court of Appeals decided, authority for the decision in this case, as will be seen by the history of the development of the law as contained not only in the case of *Stratton v. New, supra,* but in the cases cited therein;

The case of *Bank of Andrews, et al, v. Gudger,* 212 Fed. 49, is distinguishable from the case at bar in several particulars, illustrated by the opinion of the Court itself. The Court said:

> " . . . Stockholders could not acquire, through the receiver or otherwise, any lien or other claim not subordinate to the rights of creditors."

and further:

> "Such a case (stockholder's case) is entirely apart from those cases in which a creditor has come into a State Court and established or acquired by his suit a legal or equitable lien on property in the hands of the Court four months before the filing of the petition in bankruptcy. In such cases, the Courts have held that the creditor is entitled to enforce his lien in the first Court that acquired jurisdiction. The distinction is also evident between this case and those cases where the State Court held the property by its receiver . . . "

The case of *Rutledge v. Bristol,* 65 Fed. 2d 986, is not in conflict with, and is, in our opinion, clearly distinguishable from the case at bar. In that case, the Court said:

> " . . . The petitioner in the Rutledge case was not entitled to a legal lien before he secured judgment on his bond. He had no equitable lien on the assets of the bankrupt. . . . nor does the decree of the State Court undertake to establish lien in petitioner's favor. The State Court, at the time the trustee in bankruptcy was appointed had not assumed jurisdiction over any assets of the bankrupt."

In this case, we call this Honorable Court's attention to the fact that petitioners cite the dissenting opinion by Judge Sibley, and we call attention to the fact that in that dissenting opinion, Judge Sibley further said:

> "On the other hand, if the State Court first takes jurisdiction to enforce a lien on specific property, a subsequent bankruptcy which does not annul the lien will not oust the State Court jurisdiction over the property, nor vest in the Bankruptcy Court power to enjoin the State Court proceeding."

Continuing, Judge Sibley quoted from the case of *Peck v. Jennes*, 7 How. 612, at page 625; This was a case in which a lien by attachment was before the State Court, which subsequent bankruptcy was held not to annul;

> "It follows, therefore, that the District Court had no supervisory power over the State Court, either by injunction or the more summary method pursued in this case, unless it had been conferred by the Bankruptcy Act. But we cannot discover any provision in the Act which limits the jurisdiction of the State Courts or confers any power on the Bankruptcy Court to supersede their jurisdiction, annul or anticipate their judgments, or wrest property from the custody of their officers."

The case of *Moore*, 42 Fed. 2d 475, decides only, that the Bankruptcy Court may determine payment of fees to attorneys in a State Court proceeding where bankruptcy superseded the State Court proceeding within four months. We also call attention to the fact that since this is a District Court decision, it hardly supports the proposition that the case at bar conflicts with applicable decisions of this Court and of Circuit Courts of Appeal;

Merry, Trustee v. Jones, Receiver, 119 Ga. 643, and *Carling v. Seymour Lumber Co.,* 113 Fed. 483, are discussed hereinafter;

The case of *McGahee v. Cruickshank,* 133 Ga. 649, was a stockholder's bill, under which a receiver was appointed within four months of the institution of the bankruptcy proceeding, and is not in point.

Petitioners urge, that the opinion in this case holds that, for a State Court insolvency proceeding to be superseded by bankruptcy, it must be based upon a State statute which attempts to give an insolvent debtor a discharge. We respectfully urge (1) that no such point was involved in this case in the Courts below, and (2) that the decision in this case makes no such holding.

The case of *Duparquet, Hout & Moneuse Co. v. Evans,* 297 U. S. 216, 80 L. Ed. 591, was a corporate reorganization proceeding under old Chapter 77B, new Chapter X, and under the terms of Section 2 (a) (21) of the present Bankruptcy Act, the present Chapter X is exempt from the four months' jurisdictional limitation, and that case is not applicable at all to the proceeding at bar.

The case of *Gross v. Irving Trust Co.,* 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, was a proceeding in 1933, prior to the enactment of Section 2 (a) (21) of the present Act, wherein bankruptcy interposed within four months of the appointment of a receiver and involved only the question of whether the State Court, under the system there, had the right to fix fees of its officers as a lien against the assets in the hands of the trustee in bankruptcy after the superior jurisdiction of the Bankruptcy Court attached.

As held by the Circuit Court of Appeals in this case, we think "nothing in any of those decisions at all makes against the position taken below. They are, indeed, authority for it."

(2)

Response to Second Ground

Replying to the second ground, we respectfully urge that the case of *Merry, Trustee v. Jones, Receiver*, 119 Ga. 643, 46 S. E. 861, cited by petitioners is not in conflict with the case at bar.

Bankruptcy in that case intervened within four months of the institution of the State Court proceeding. The State Court held that no proper case of a lien foreclosure was made, since the mortgage was not recorded, the pleadings did not describe the mortgage and there was no prayer for foreclosure. The petitioner had a mortgage, but it was also alleged that he had a debt. The mortgage was not set out in the pleadings, nor was it shown what property the mortgage covered, "the relief prayed for may have been asked as well because the complainant was a creditor as because it had a lien." (Page 647.)

The converse was held by the Supreme Court of Georgia in a later case, *Nelson, et al, v. Spence, et al*, 129 Ga. 35, 58 S. E. 697, where the Court in the first headnote said:

> "Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceeding, a receiver's possession thereunder, as to the property included in the mortgage, will not be affected by a subsequent adjudication in bankruptcy."

See also *Carling v. Seymour Lumber Co.* (C. C. A. 5) 113 Fed. 483.

II.

CONCLUSION

A.

NATURE OF THE STATE COURT PROCEEDING

While we contend that it was conceded by all parties in the Court below that the State Court proceeding was in the nature of an equitable proceeding to enforce a judgment

lien, we will discuss that question since the petition for certiorari is based on the contention that the State Court proceeding was an insolvency proceeding tantamount to bankruptcy, instead of a proceeding to enforce a lien.

Oberdorfer having obtained a judgment lien and having been unable to enforce the payment of same by legal means, having attempted to enforce it by garnishment proceedings, as well as by levy, and after the return of a nulla bona thereon by the officer charged with the duty of enforcing it, and after having attempted to make a compromise settlement thereof, was without any remedy for the enforcement of its judgment lien except in equity. (R. 36, 37, 51, 52, 53, 54.)

All of the assets of the defendant were covered by a blanket mortgage as well as various and sundry other liens, totalling in excess of $7,000.00; the only way that the Oberdorfer lien could be enforced was in the manner pursued, i. e. an equitable bill for a receiver to marshal the assets, reduce them to cash and satisfy all liens entitled to priority over the Oberdorfer lien. This, of necessity, had to be accomplished before the Oberdorfer judgment lien could be satisfied.

The statutes of Georgia provide relief in such instances in equity, where the Courts are authorized, by statute, to appoint receivers and marshal and liquidate assets where it is necessary to do so in order to enforce such liens.

These remedies are available only to those who occupy a position like that in which Oberdorfer found itself, unable to obtain satisfaction by legal remedies.

These remedies are given under the following Sections of the Georgia Code: 37-401, 37-405, 37-407, 37-408 and 55-106. (Appx. 2, 3, 4, 5, 6.)

A petition filed under these Code Sections must affirmatively show and allege:

(a) That the creditor has a valid, pre-existing lien; and

(b) That he has exhausted every available legal remedy and has been unable to satisfy the judgment at law.

In *Smith v. Manning*, 155 Ga. 209 (3a) it was held:

> "As a general rule, a creditor without a lien or an interest in property is not entitled to an injunction or receiver in order that the property may be forthcoming to satisfy a common law judgment which the creditor might obtain on his demand."

The same proposition of law was in the case of *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365, a case arising in the Georgia Courts; it was held:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment."

When such a bill is filed under Georgia law all parties seeking to assert rights against the res in the hands of the Court's receiver may intervene and become parties plaintiff, and are entitled to have the position of priority of their claim determined and paid from the assets so held by the Court. See Code of Georgia for 1933, 37-407. (Appx. 4.)

The filing and sanction of the State Court bill in this case itself created an equitable lien on all of the assets of the debtor, more than four months prior to the institution of the bankruptcy proceeding. *Miller v. Sherry*, 2 Wall, 17 L. Ed. 827, 237; *Railway Co. v. Pettus*, 113 U. S. 116-124, 5 S. Ct. 387.

An examination of the allegations in Oberdorfer's petition will show that it was a proper procedure under the law and the facts for the foreclosure of a judgment lien unenforcible at law. If there are any superfluous allegations they do not change the nature of the proceeding. The proceeding WAS one for the enforcement of a lien. In *Carling v.*

Seymour Lumber Co. (C. C. A. 5) 113 Fed. 483 (Certiorari denied, 186 U. S. 484, 46 L. Ed. 1261) the Court in discussing unnecessary and unusual allegations contained in a petition, said:

> "It is true that the petition contains other averments that are unnecessary and unusual in a foreclosure suit, such as demand and refusal to pay, that the petition is for the benefit of the petitioner and other creditors, etc. . . . But the bill contains all the allegations necessary to a valid decree appointing a receiver and foreclosing the two mortgages. The fact that it contains other and unnecessary averments, even if made to conform to a statute no longer operative, does not deprive the petition of equity, and defeat the jurisdiction as to the matters well pleaded.
>
> "The purpose of the petition was among other things a foreclosure on a mortgage and the possession of the property by the receiver to be appointed by the Court, and where the Court adjudged the petition to be sufficient and made the appointment, that appointment cannot be questioned by another Court or the possession of the receiver appointed be disturbed."

The State Court proceeding in this case has been adjudged sufficient by that Court (R. 67, 68, 69) and no appeal has been taken from that order of adjudication, and the time for appeal has expired.

B.

GEORGIA INSOLVENT TRADERS' ACT

Attention of this Honorable Court is called to the Georgia Insolvent Traders' Act only because it is referred to in the case of *Carling v. Seymour, supra,* and to show that the State Court proceeding in this case was not brought under that Act, nor could it have been brought under that Act since that Act requires that the petition be brought by creditors representing one third in amount of the unsecured debts as well as other facts not existing in this case. See Georgia Code Section 28-402. (Appx. 1.)

C.

SUMMARY

The opinion of the Circuit Court of Appeals in the case at bar is based upon the principles first laid down in the case of *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, and consistently thereafter followed in such cases as: *Stellwagen v. Clum*, 245 U. S. 605, 38 S. Ct. 315, 62 L. Ed. 507; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Metcalf v. Barker*, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122; *International Shoe Co. v. Pinkus*, 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318; *Stratton v. New*, 283 U. S. 327, 75 L. Ed. 1060, 51 S. Ct. 465. See also the following cases involving the same point arising under Georgia law: *Yaryan Naval Stores v. Borchardt*, 217 Fed. 758; *Blair v. Brailey*, 221 Fed. 1, 136 C. C. A. 524 (Certiorari denied, 283 U. S. 634, 59 L. Ed. 1499). This principle was also followed in two Texas cases by the United States Circuit Court of Appeals for the Fifth Circuit. *Bryan v. Speakman*, 53 Fed. 2d 463; in re: *White Star Refining Co.*, 74 Fed. 2d 269.

There seems to be a reference in the petition for certiorari and the petitioners' brief to two points in reference to Section 2 (a) (21) of the Bankruptcy Act.

There is some indication that petitioners feel that Section 70 (a): U. S. C. A. Title 11, Section 110 (a), relating to the title of trustee should be construed as limiting Section 2 (a) (21), U. S. C. A. Title 11, Section 11 (a) (21). It seems clear to us that Section 2 (a) (21), being that part of the Act fixing the jurisdiction of the Court, is a limitation on Section 70 (a), and we think that this interpretation is so clear that we discuss it no further. This Court has had this question before it in the case of *Emil v. Hanley*, 63 S. Ct. 687 (March 15, 1943). It was also before the Circuit Court of Appeals in the case of *Muffler v. Pettigrew Real Estate Co.*, 132 Fed. 2d 479 (Certiorari denied by this Court in 63 S. Ct. 1329, 87 L. Ed. 1168.)

Petitioners contend that Section 2 (a) (21) does not alter the law as to the supersession of State Court insolvency proceedings by bankruptcy. We contend that Section 2 (a) (21) is authority for the decision of the United States Circuit Court of Appeals in this case, and that the decision also conforms to the law as it existed before Section 2 (a) (21) was added to the Act. If 2 (a) (21) does alter the law, it supports the decision in the Court below. If it does not alter the law, then, the decision below but reaffirms the state of the law prior to the enactment of 2 (a) (21).

We respectfully submit that the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case is not in conflict with the applicable decisions of this Court nor those of any of the other United States Circuit Courts of Appeal, nor of the decisions of the Georgia Courts, and respectfully urge that the certiorari should be denied.

Respectfully submitted,

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